IN THE HIGH COURT OFJUDICATURE FOR RAJASTHAN AT JODHPUR

:: JUDGMENT ::

Gopal Raj
Vs.
State of Rajasthan

S.B. CRIMINAL APPEAL NO.23/1988 AGAINST JUDGMENT DATED 03.12.1987 PASSED BY THE LEARNED ADDITIONAL SESSIONS JUDGE NO.1, JODHPUR

DATE OF ORDER :: 23rd August, 2006

REPORTABLE

PRESENT

HON'BLE MR. JUSTICE MOHAMMAD RAFIQ

Mr.Dev Raj Bohra, for the appellant.

Mr.Rameshwar Dave, Public Prosecutor, for the State.

The present appeal is directed against the order dated 03.12.1987 passed by the Additional Sessions Judge No.1, Jodhpur whereby he rejected the application of the appellant under Section 446(2) Cr.P.C.

The factual matrix of this appeal are that accused Mohan Singh along with certain another accused was facing criminal

trial in the court of Additional Sessions Judge No.1, Jodhpur for offence under Sections 307, 147, 148 and 149 IPC in criminal case No.14/1985. When he was granted bail pending trial, the appellant had given his surety for a sum of Rs.3000/-. However, when the accused Mohan Singh did not appear in the court on 24th June, 1986, the said court forfeited his bail bonds and sureties and directed for initiation of proceedings under Section 146 Cr.P.C. for forfeiture of amount of sureties. The court therefore issued notice to the appellant on 25th June, 1986. After service of the notice, the appellant was granted several opportunities to file reply to the application. He assured that he will produce the accused before the Court. Finally the appellant preferred an application under Section 446(3) Cr.P.C. on 04th August, 1987 and requested that last opportunity may be granted for enabling him to produce the accused. The court thereupon passed an order directing that the warrant of attachment shall remain stayed till the next date and if the appellant still failed to produce the accused on the next date, the warrant of attachment should be issued. When the matter was taken up on 25th September 1987, the request was made on behalf of appellant that arrest warrant of the accused should be issued on his new address which he furnished. The request was accepted and the order was also passed. It was also directed that the warrant of attachment should not be issued till the next

date. The matter was then adjourned on various duties but finally the learned court below by its order dated 03rd December, 1987 rejected the application of the appellant by a detailed order. The court held that on request of the appellant several opportunities were granted to him to produce the accused and thereafter the court on 04th August, 1987 while rejecting his application under Section 446 (3) Cr.P.C. directed him to produce accused on or before the next date of hearing and stayed the issuance of warrant of attachment till the next date. The application filed under Section 446 (3) Cr.P.C. therefore already stood rejected on 04th August, 1987. The court directed for issuance of the warrant of attachment.

I have heard Shri Dev Raj Bohra, learned counsel for the appellant and Shri Rameshwar Dave, learned Public Prosecutor for the State and perused the record.

Learned counsel for the appellant has argued that in the order passed by the court on 04th August, 1987 application of the appellant was shown to have been rejected but in fact by the self same order, the learned trial court had granted opportunity to the appellant to produce the accused before the next date and also simultaneously stayed the issuance of the warrant of attachment. The trial court thereafter on the next date on 25th

September, 1987 issued fresh warrant of arrest against the accused at his new address furnished by the appellant and had also directed for extension of the stay order as regards issuance of the warrant of attachment. The application was finally rejected vide order dated 03rd October, 1987 which is the impugned order in the present appeal. He argued that it is only by the impugned order that the application preferred by the appellant under Section 446 (3) Cr.P.C. was finally rejected. He argued that having granted the opportunity to the appellant to produce the accused, learned court did not decide his application filed under Section 446(3) Cr.P.C. on merits invoking its discretion to remit the option of the penalty. The present appeal against the impugned order is therefore maintainable under Section 449 Cr.P.C. He argued that when the court had granted the opportunity to produce the accused, it abstained from exercising the discretion whether or not penalty was to be remitted and if so, to what extent. Even otherwise, the appellant had given sureties for production of the accused in the court of Judicial Magistrate No.5 and his sureties was forfeited on account of non-production of the accused in the court of Additional District and Sessions Judge No.1, Jodhpur. In the circumstances, the learned trial court could not have forfeited his sureties. Lastly, the learned counsel for the appellant argued that in the criminal case in which the accused absented has come to an end and the

accused for whom the appellant had stood surety has been acquitted of the charges under Sections 307, 147, 148 and 149 IPC. by the judgment of the court passed on 09th December, 1987. The order passed by the learned trial court is deserves to be dismissed.

On the other hand, Shri Rameshwar Dave, learned Public Prosecutor has argued that the application of the appellant was already rejected by the trial court, the another application on the same subject matter was not maintainable in view of bar contained in Section 362 Cr.P.C. He argued that the appellant was allowed several opportunities to produce the accused and despite of that he failed to produce the accused. Forfeiture of his surety point was therefore perfectly legal and justified. The present appeal is to be rejected.

I have considered the arguments advanced by learned counsel for the parties and perused the records.

It appears from wordings of the court dated 24th August, 1987 that this was a composite order whereby the learned court having rejected the application in a self same order directed that the warrant of attachment shall remain stayed to enable the appellant to produce the accused before the next date and if he

failed to produce him on the next date, such warrant shall be issued. It appears that the appellant submitted an application in the court on 25th September, 1987 thereby furnishing fresh address of the accused, on the basis of which the learned trial court issued warrant of his arrest and also extended the order staying issuance of warrant of attachment till the next date. This order was again extended on 31th October, 1987, 04th November, 1987 and 25th November, 1987 on which date the matter was finally fixed on 03rd December, 1987.

Examination of the record also reveals that the appellant on different dates requested for opportunities to produce the accused and was allowed such opportunities to enable him to produce the accused. He submitted a written applications to this effect on 22nd February, 1987 and 24th February, 1987. Besides, the oral requests were also made on behalf of the appellant and the same were allowed by the learned trial court.

Upon failure of the appellant to produce the accused, when warrant of attachment was issued, the appellant submitted an application on 03rd August, 1987 for remission of the amount of fine as contemplated of Section 446(3) Cr.P.C. The sequence of the orders passed by the court on various dates allowing opportunities to the appellant to produce the accused clearly

reveals that the trial court in its order passed on 04th August, 1987 granted opportunity to the appellant to produce the accused and simultaneously stayed issuance of the warrant of attachment. The court did not however pass any order on the question of remission of the amount of penalty. Thus, the trial court only partly exercised its discretion and refrained from passing the final order by allowing opportunity to the appellant to produce the accused. Not only it did not pass any order regarding remission of the amount of penalty, it also stayed execution of the warrant of attachment. The ultimate and final order which is impugned in the present appeal was passed on the basis of the same proceedings initiated on the application of the appellant. It was necessary for the court to exercise its discretion by either accepting or refusing the request of remission of the penalty amount. The learned trial court erred in law in treating the application of the appellant as fresh or second whereas the proceedings were being continued on the basis of application originally filed by the appellant under Section 446(3) Cr.P.C. on 25.11.1987. Subsequent applications filed by the appellant during the pendency of these proceedings were all supplemental in nature of the original application filed on which the appellant was granted opportunity to produce the accused by order dated 04th August, 1987. First application of the appellant when kept revived for the purpose of enabling him to produce

the accused and withholding warrant of attachment on that assurance could not be treated to have been rejected for the purposes of remission of the penalty. In other words, when it was a composite application, such application could not be rejected for one purpose and kept revived for another. The learned trial court below thus committed an error of law in not applying its mind to the request of the appellant in so far as remission of the penalty is concerned. Now that the accused in the main case has been acquitted by order of the trial court on 09th December, 1987, it would be in the interest of justice to remit the amount of surety of Rs.3000/- to the extent of its 10%.

In the result, the appeal is allowed. The amount of penalty of Rs.3000/- is ordered to be remitted to the extent of its 10% in exercise of powers of the court under Section 446(3) Cr.P.C.

[MOHAMMAD RAFIQ],J.

Ashwini/-